(5)
Office-Supreme Court, U.S.
FILED
JUL 18 1985
ALEXANDER L. STEVAS

No. 84-1288

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1984

JOHN V. EVANS, et al.,
Petitioners,

v.

JEFF D., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONERS

ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, FLORIDA, GEORGIA, HAWAII, INDIANA, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING, PUERTO RICO, GUAM, AND THE VIRGIN ISLANDS OF THE UNITED STATES

FRANCIS X. BELLOTTI
Attorney General
Commonwealth of Massachusetts

ELLEN JANOS*
CARL VALVO
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-1031

*Attorney of Record
(see inside front cover for additional counsel)

BEST AVAILABLE COPY

CHARLES A. GRADDICK, Attorney General
State of Alabama

HAROLD BROWN, Attorney General
State of Alaska

ROBERT K. CORBIN, Attorney General
ANTHONY CHING, Solicitor General
State of Arizona

JOHN STEVEN CLARK, Attorney General
State of Arkansas

JOHN VAN de KAMP, Attorney General
State of California

DUANE WOODARD, Attorney General
State of Colorado

CHARLES M. OBERLY, Attorney General
State of Delaware

JIM SMITH, Attorney General
State of Florida

MICHAEL J. BOWERS, Attorney General
State of Georgia

RICHARD G. OPPER, Attorney General
Territory of Guam

CORINNE WATANABE, Acting Attorney General
State of Hawaii

LINLEY E. PEARSON, Attorney General
State of Indiana

THOMAS J. MILLER, Attorney General
State of Iowa

ROBERT T. STEPHAN, Attorney General
State of Kansas

DAVID L. ARMSTRONG, Attorney General
State of Kentucky

(See inside back cover for
additional counsel)

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	9
ARGUMENT	13
I. THE RULING BELOW IS INCONSISTENT WITH THE CIVIL RIGHTS ATTORNEY'S FEES ACT.	13
A. Section 1988 Was Not Intended By Congress To Preclude Simultaneous Negotiation Of Fees And Substantive Relief.	13
B. Some Tension Between Plaintiffs' Interests And Those Of Their Counsel Is Inherent In The System Congress Created.	24
C. The Effect Of The Ninth Circuit's Rule Is To Deter Settlement Of Civil Rights Cases, Contrary To Congressional Policy, The Interests of Plaintiffs, And Sound Judicial Administration.	28

Page

II. LAWYERS' ETHICAL OBLIGATIONS DO NOT PRECLUDE THE SIMULTANEOUS NEGOTIATION AND SETTLEMENT OF ATTORNEY'S FEES WITH THE MERITS OF A CLASS ACTION. 35

A. Standards Governing Professional Ethics Do Not Prohibit The Simultaneous Negotiation Or Waiver Of Attorney's Fees. 37

B. If Attorneys For Plaintiffs Discuss And Set Out In Writing Their Fee Agreement As They Should, There Will Be No Ethical Problems When Subsequent Offers Are Made. 45

C. A Rule Prohibiting Simultaneous Negotiation Impedes Defense Counsel's Obligation To His Client. 51

III. ADEQUATE MECHANISMS EXIST TO ENSURE THAT A SETTLEMENT CONTAINING A FEE PROVISION HAS BEEN PROPERLY NEGOTIATED AND IS FAIR AND REASONABLE. 54

TABLE OF AUTHORITIES

Page

Cases

Armstrong v. Reed,
462 F. Supp. 496
(N.D. Miss. 1978) 7n.

Brown v. General Motors Corp.,
722 F.2d 1009
(2d Cir. 1983) 23

Burks v. Lasker,
441 U.S. 471 (1979) 55

Chesny v. Marek,
720 F.2d 474
(7th Cir. 1983) 47

Delta Airlines, Inc. v. August,
450 U.S. 346 (1981) 33, 35

Jeff D. v. Evans,
743 F.2d 648
(9th Cir. 1984) 16n., 27n., 36

Franks v. Kroger Co.,
649 F.2d 1216
(6th Cir. 1981) 57n.

Hensley v. Eckerhart,
461 U.S. 424 (1983) 32, 34n.

Johnson v. Zerbst,
304 U.S. 458 (1938) 17n.

Page

Lazar v. Pierce,
757 F.2d 435
(1st Cir. 1985) 17n., 19n., 20, 25, 53

Maher v. Gagne,
448 U.S. 122 (1980) 16n., 17

Malchman v. Davis,
761 F.2d 893
(2nd Cir. 1985) 55

Marek v. Chesney,
No. 83-1437, slip op.
(June 27, 1985) 20, 21, 25, 26, 28, 31, 34, 40, 47, 52

Moore v. National Association of Securities Dealers,
762 F.2d 1093
(D.C. Cir. 1985) 23, 29, 44, 50, 57n., 58n.

N.A.A.C.P. v. Wilmington Medical Center, Inc.,
689 F.2d 1161
(3d Cir. 1982)
cert. denied,
460 U.S. 1052 (1983) 7n.

Officers for Justice v. Civil Service Commission,
688 F.2d 615
(9th Cir. 1982)
cert. denied,
459 U.S. 1217 (1983) 55

Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.,
105 S. Ct. 658 (1985) 14

	Page
Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977)	29n.
Soskel v. Texaco, Inc., 94 F.R.D. 201 (S.D. N.Y. 1982)	57n.
Tornabene v. General Development Corp., 88 F.R.D. 53 (E.D. N.Y. 1980)	57n.
Weinberger v. Kendrick, 698 F.2d 61 (2d Cir. 1982), cert. denied 104 S. Ct. 77 (1983)	56
White v. New Hampshire Dept. of Employment Security, 455 U.S. 445 (1982)	24, 27, 29 39, 52
Statutes	
42 U.S.C. § 1988	10, 14, 15, 18 22, 32, 33, 34
Legislative Materials	
H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976)	34n.

Page

S. Rep. No. 1011, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Ad. News 5908. 16n., 34n.

The Legal Fee Equity Act: Hearing on S. 2802 Before The Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess., (1984) 3n.

122 Cong. Rec. 33,314 20n.

122 Cong. Rec. 35,127 20n.

Miscellaneous

Federal Rules of Civil Procedure
Rule 23(e) 54, 58
Rule 68 40

Model Code of Professional Responsibility 37n., 40, 42
Canon 5 37
Canon 6 27n.
Canon 7 27n., 51n.
DR 1-102(A)(5) 41n.
DR 2-106(C) 46n.
DR 5-101(A) 27n., 51n.
DR 5-103(A) 23n.
DR 5-103(A)(2) 43n.
DR 5-105(A) 43
EC 5-1 38
EC 2-19 48n.

Page

EC 2-20 46n.
EC 7-7 52
EC 7-8 52

Model Rules of Professional
Conduct 37n., 40, 41n., 42, 47
Rule 1.1 51n.
Rule 1.2(a) 52
Rule 1.5 41n.
Rule 1.5(b) 48
Rule 1.5(c) 43n., 46n., 48
Rule 1.7 38
Rule 1.7(b) 27n., 42
Rule 1.8(j) 23n.
Rule 2.1 37

Canons of Professional
Ethics (1908) 37n.

Calhoun, Attorney-Client Conflicts of
Interest and the Concept of
Non-negotiable Fee Awards
Under 42 U.S.C. § 1988,
55 U. Colo. L. Rev.
341 (1984) 30n.

Comment, Settlement Offers Conditioned
Upon Waiver of Attorneys' Fees:
Policy, Legal, and Ethical
Considerations,
131 U. Pa. L. Rev.
793 (1983) 29n.

	Page
New York City Bar Association Opinion, 80-94, 36 Rec. A.B. City N.Y. 507 (1981)	41n.
C. Wright & A. Miller, Federal Practice and Procedure, § 1797 (1972)	55n.

No. 84-1288

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

JOHN V. EVANS, et al.,

Petitioners,

v.

JEFF D., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE,
In Support Of Petitioners

INTEREST OF AMICI CURIAE

This case presents the important question whether federal law prohibits the parties to a civil rights action from negotiating a settlement of the defen-

dant's liability for statutorily authorized attorney's fees at the time the parties negotiate the settlement of other forms of relief.

The States have a substantial interest in the resolution of this issue. The decision of the court below, holding it improper as a matter of federal law for defendants in virtually any civil rights class action to negotiate a settlement on the merits simultaneously with a settlement of attorney's fees, will substantially impede the settlement of all but the most compelling and meritorious of cases against governmental entities. Accordingly, the decision may well result in an unnecessary increase in costs to the States and in the workload of the federal courts without a

concomitant increase in benefits to civil rights plaintiffs.[1/]

The States, through their elected and appointed officials, are common targets for civil rights lawsuits, particularly class actions. The States regularly seek to settle such cases for a variety of reasons, some shared by all civil litigants, some unique to govern-

---

1/ Under the rule created by the court below, even if the parties manage to settle the merits of the lawsuit, the fee claim remains to be litigated. Because of the high degree of uncertainty and inconsistency in the application of attorney's fees law, these claims have proven highly resistant to settlement, thus requiring further judicial involvement. See generally The Legal Fee Equity Act: Hearing on S. 2802 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 98th Cong., 2d Sess. 234-356 (1984) (statements and materials submitted by Francis X. Bellotti, Attorney General of Massachusetts, Steve Clark, Attorney General of Arkansas, and David L. Wilkinson, Attorney General of Utah).

mental defendants. Like all pragmatic defendants, state defendants have strong incentives to compromise cases in which there is a high degree of certainty that plaintiffs will prevail. Perhaps more so than private defendants, governmental defendants will ordinarily seek to settle a separate class of cases whose legal merits may be more doubtful but whose results do not conflict with the defendant's program objectives. In such cases the devotion of expensive litigation resources may, because of extensive discovery and lengthy trial preparation, significantly distract officials from the administration of essential state programs, including those serving the plaintiffs. Hence litigation may be seen as detrimental to both the government and the public it serves.

In the first class of cases, the defendant naturally will seek to minimize his fee liability, but will almost certainly not be in a position to insist on a total fee waiver; the risk of preventing settlement and incurring even greater fee liability after full litigation simply does not justify such a bargaining position. In the second class of cases, cost-benefit analysis on a case-by-case basis will determine the amount of fees that can be offered in settlement. As the potential attorney's fee awards in these cases can and often do far exceed the cost of the merits settlements, the prospect of settlement is highly sensitive to the ability of the defendant to ascertain in advance the total liability. Only then can the defendant make a cost-benefit assessment of the entire settlement package.

Perhaps the most unfortunate impact of the rule adopted below will be on a third class of litigation that state defendants frequently encounter. These are cases in which the government has strong, even dispositive, legal defenses, but because of considerations of public policy, sound administration, or compassion, the defending state official desires to give the plaintiffs what they ask for. However, to agree to such gratuitous relief is to incur liability for fees. If the decision to settle is made at the outset of the litigation, the amount of fees incurred will likely--though not necessarily--be sufficiently modest to permit settlement. It often happens, however, that changes in policy occur through the normal political process after years of litigation have been

invested in a case and the amount of fees thus incurred will have risen to the six- or seven-figure level. Most state budgets simply do not allow the "luxury" of diverting tax dollars from pressing public needs to the payment of lawyers whose clients are unlikely to prevail but for settlement.[2/] This is not to say that in all such cases relief will be held hostage to a fee waiver. However, it

---

2/ If the government acts unilaterally to change policy, improve services, or upgrade institutions as requested in the plaintiffs' complaint, it nonetheless runs the substantial risk of being found liable for fees because the plaintiffs will have obtained some of the relief sought by the complaint. See, e.g., Armstrong v. Reed, 462 F. Supp. 496, 498-99 (N.D. Miss. 1978). At the very least, it will have created the occasion for another lawsuit to determine whether the complaint was a material factor in securing the improvements. See, e.g., N.A.A.C.P. v. Wilmington Medical Center, Inc., 689 F.2d 1161, 1169 (3d Cir. 1982) cert. denied 460 U.S. 1052 (1983).

cannot be denied that settlement of many cases is impossible without a waiver or a substantial reduction of the fee liability. The rule established below will force the removal of the fee issue from the bargaining table where it may be an essential ingredient to a successful settlement. The amici, both in their institutional capacities and as entities committed to the protection of their citizens, will suffer the consequences.

For these reasons, the amici join the Idaho petitioners in urging reversal of the decision below. The amici urge this Court to decline to adopt any per se rule governing settlement in a civil rights case. Rather, the parties should be free to construct settlements that address all of their concerns without predetermination by judge-made rules.

In class actions, fairness is assured by the district court's Rule 23(e) review the parties' negotiated settlements. This approach, long-accepted in other types of cases, relies on the ability of the parties to negotiate settlements consistent with the law and with attorneys' ethical obligations to their clients. Permitting the same dynamics of negotiation that govern most civil cases to govern settlements of civil rights cases will ensure a reasonable compromise of civil rights claims, including claims for attorney's fees.

SUMMARY OF ARGUMENT

I. The rule against simultaneous negotiation of substantive relief and attorney's fees announced by the court below purports to give effect to The

Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Yet the rule finds no basis in either the language or history of § 1988. Moreover, the rule reflects a paternalistic policy orientation that is inconsistent with that of the Congress and conflicts with the admonitions of this Court concerning the importance of voluntary settlement of cases, including fees, to the overall administration of justice. Voluntary settlement of cases will be greatly diminished if defendants are unable to ascertain their total liability or if defendants are forced to make a deflated merits offer to cushion against a subsequent fee award of an unknown amount. A rule that impedes settlements is detrimental to the public, the defendants,

and most important, to civil rights plaintiffs.

II. A blanket rule precluding the simultaneous negotiation of the merits of a case and the fees merely because of a possibility of diverging interests between the class members and their lawyer, has no basis in any commonly accepted formulation of professional responsibility. As long as a lawyer represents his client competently and zealously and exercises independent judgment on behalf of his client, ethical problems need not arise. Moreover, by setting out in a fee agreement at the beginning of the representation how the lawyer will deal with an offer that contains a fee provision, potential ethical problems will be avoided.

By attempting to eliminate a potential ethical problem for plaintiffs' counsel, the court below created one for defense counsel. A bifurcated approach to settlement prevents defense counsel from adequately advising his client as to the risks and benefits of a settlement.

III. A prophylatic rule prohibiting simultaneous negotiation of fees and the merits of a case is not necessary. The usual dynamics of negotiation, which takes into consideration the strengths and weaknesses of each side's case, notice to the class prior to approval of a settlement, and the required district court approval for a class action settlement, is all that is necessary to ensure that a settlement has been negotiated in good faith and represents a fair compro-

mise of the parties' claims, including a claim for fees. These existing mechanisms are sufficient to meet the concerns of both the class members and their counsel.

ARGUMENT

I. THE RULING BELOW IS INCONSISTENT WITH THE CIVIL RIGHTS ATTORNEY'S FEES ACT.

A. Section 1988 Was Not Intended by Congress To Preclude Simultaneous Negotiation Of Fees And Substantive Relief.

The Court of Appeals' rule against simultaneous negotiation of fees and merits rests in large part on its view that such a practice conflicts with the intent of Congress as embodied in § 1988. Yet the court divines that intent from

sources other than the primary expression of congressional intent: the plain language of the statute itself. Park 'N Fly, Inc. v. Dollar Park And Fly, Inc., 105 S. Ct. 658, 662 (1985).

It was necessary for the court to bypass this primary source in order to reach its conclusion simply because § 1988[3/] contains no language even arguably prohibiting simultaneous negotiation. Nowhere in the express language of the statute is there any discussion,

---

3/ Section 1988 states in relevant part,

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

mention, or clue regarding congressional policy on simultaneous negotiation of fees and merits or waiver of fees. Nor is there any indication in the legislative history of § 1988, which contains an otherwise extensive discussion of congressional policy on attorney's fees in civil rights cases, that Congress thought it appropriate to discourage, much less prohibit, simultaneous negotiations or voluntary waiver of fees.

In the absence of any direct supporting evidence in the legislative materials concerning simultaneous negotiation of fees, the court below based its analysis of congressional intent on a series of observations: that Congress authorized the award of fees to enable "aggrieved

parties . . . to advance the public interest by invoking the injunctive powers of the Federal courts";[4] that, absent special circumstances, prevailing parties should ordinarily recover fees, id., and finally that plaintiffs who obtain favorable settlements may be said to have prevailed and thus are eligible for fees.[5] While these observations establish that fees should ordinarily be awarded to a plaintiff who obtains a favorable settlement on the merits, as

---

4/ Jeff D. v. Evans, 743 F.2d 648, 651 (9th Cir. 1984) (quoting S. Rep. No. 1011, 94th Cong., 2d Sess. 3, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5910).

5/ Id. (citing Maher v. Gagne, 448 U.S. 122, 129 (1980)).

in Maher v. Gagne,[6] they do not lead to the conclusion that congressional policy precludes simultaneous negotiation of all claims for relief, including negotiations leading to the compromise or waiver of fees. If fundamental constitutional rights can be knowingly be waived,[7] "it would be an excess of paternalism" to conclude that Congress intended to prevent waivers of attorney's fees, particularly where no textual expression of such an intent exists.[8]

6/ In Maher, "[t]he parties informally agreed that the question whether respondent was entitled to recover attorney's fees would be submitted to the District Court after entry of the consent decree." Id. at 126.

7/ E.g., Johnson v. Zerbst, 304 U.S. 458 (1938).

8/ Lazar v. Pierce, 757 F.2d 435, 439 (1st Cir. 1985) (Torruella, J., concurring).

While the statute and its history yield no basis for concluding that Congress opposed simultaneous negotiations or voluntary waivers, they do reveal that Congress did not think it was establishing a mandatory duty to award fees or even an unqualified right to recover fees. Section 1988 provides simply that the district court, "in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee . . . ." Even in light of the strong presumption in favor of fee awards, it is difficult to imagine circumstances that would better support a discretionary denial of fees than a knowing and voluntary waiver, tendered in exchange for substantive relief greater than what would likely have been obtained through continued litiga-

tion.[9] To reverse the District Court's ruling in these circumstances and impose a virtually universal rule prohibiting simultaneous negotiation is to rewrite the statute, effectively deleting the discretion that Congress gave to the district court.[10]

As this Court recently observed, Congress authorized fee awards to enable

---

9/ Even in a case where the legal liability of certain defendants was much more probable than here, the First Circuit not only upheld the discretionary denial of fees, but questioned the propriety of plaintiff counsel's conduct in bargaining for substantive relief in return for a fee waiver, only to renounce the waiver while seeking to retain the benefit of the bargain. Lazar v. Pierce, 757 F.2d at 437-439.

10/ Of course, even if one views § 1988 as creating an absolute entitlement to fees, there is no rule of law that prohibits settlement or waiver of claims to statutory entitlements.

an aggrieved party with a meritorious civil rights claim to gain access to the judicial process; it did not intend to create an entitlement program for lawyers. Marek v. Chesny, No. 83-1437, slip op. at 8, 9 (June 27, 1985).[11/] The distinction is critical because, if the prospect of a fee award "belongs" to the client, it may be used as a bargaining chip in negotiations in the client's behalf just as surely as statutorily authorized declaratory, injunctive, and damages relief may be waived, reduced, expanded, or deferred as the parties search for a mutually acceptable result. Lazar

---

11/ The proponents of § 1988 repeatedly emphasized that it was not intended as an aid program for lawyers. See, e.g., 122 Cong. Rec. 33,314 (remarks of Sen. Kennedy); 35,127 (remarks of Rep. Jordan) ("This is not a food-stamp bill for lawyers.").

v. Pierce, 757 F.2d at 440 (Torruella, J., concurring). Under this view of § 1988, the potential availability of a fee award helps to achieve the overriding congressional purpose--to enable aggrieved persons to obtain substantive relief--as effectively as does an actual award after successful litigation, except that a negotiated settlement affords relief sooner and with greater certainty. Marek v. Chesny, slip op. at 8.[12/] The

---

12/ This is particularly true where a plaintiff "prevails" as a result of a defendant's gratuitous willingness to consent to a judgment that would not have been legally compelled had the suit been fully litigated. As this case illustrates, governmental defendants often settle cases even where strict legal liability is doubtful in order to serve public policy objectives. Assuming that such a practice is desirable, the rule established by the court below will inevitably make such settlements less attractive, as each such agreement will

(footnote continued)

rule created by the court below, by greatly diminishing the incentives to settlement, vitiates an important mechanism for redressing the grievances of civil rights plaintiffs and, to that extent, undermines both the ultimate purpose of § 1988 and the broader public policy favoring settlement of litigation.

The true congressional policy finds textual expression in the fact that § 1988 authorizes an award of fees only to the "prevailing party," not to his or her counsel, whose right to such fees is one of subrogation to the client's statutory entitlement. As the District of

---

(footnote continued)

carry with it an attorney's fees price tag of indeterminate amount that must be paid from the same tax dollars available to serve the needs of the plaintiff class.

Columbia Circuit has observed, "[t]his appears the more reasonable approach, and is one which would greatly reduce . . . alleged conflicts of interest." Moore v. National Ass'n of Securities Dealers, 762 F.2d 1093, 1099 n. 10 (D.C. Cir. 1985) (Title VII class action) (citing Brown v. General Motors Corp., 722 F.2d 1009, 1011 (2d Cir. 1983)).[13/]

13/ Implicit in the reasoning of the court below is that § 1988 creates a property interest belonging to the lawyer, not the party; hence, the alleged conflict of interest. Under this view, Congress has given to plaintiff's counsel precisely what the Code of Professional Responsibility counsels against: a proprietary interest in the cause of action or subject matter of litigation conducted for a client. Model Code of Professional Responsibility DR 5-103(A) (1979); accord Model Rules of Professional Conduct Rule 1.8(j) (1983). Had Congress actually intended to preempt a disciplinary rule in effect in virtually every American jurisdiction, one would expect some evidence of such an intent in the legislative materials. Yet, there is none.

B. Some Tension Between Plaintiffs' Interests And Those Of Their Counsel Is Inherent In The System Congress Created.

The alleged ethical dilemma faced by plaintiffs' counsel is not a function of the civil rights nature of this lawsuit, nor is it the product of a negotiation tactic unique to public defendants. Rather, it springs from the dynamics of fee-shifting itself. As this Court has observed, whenever a party may be liable for fees as well as for other relief, he will have "good reason to demand to know his total liability" before entering into a negotiated settlement. White v. New Hampshire Dept. of Employment Security, 455 U.S. 445, 454 n. 15 (1982). Indeed, defendant's attorney "owes a positive duty to his client to reduce his liability and his exposure to recovery, to the

limits of the attorney's ability." Lazar v. Pierce, 757 F.2d at 439 (Torruella, J., concurring). This duty finds expression in efforts to negotiate fee liability along with substantive relief in any civil rights lawsuit subject to a fee-shifting statute. Unless Congress intended to treat civil rights cases differently from other civil cases insofar as settlement is concerned, a proposition this Court rejected in Marek v. Chesny, slip op. at 8, there is no justification for a prophylactic rule shielding plaintiffs' counsel from the choices necessitated by statutory fee-shifting.

To be sure, plaintiffs' counsel may be required to "think very hard" about the strength of the case and the choice

between continued litigation and waiver or reduction of the fee claim to induce settlement. Lawyers often do and always should think very hard before accepting any element of a settlement that represents less than what might reasonably be expected from vigorous litigation. But the need to make hard choices does not counter the congressional policies underlying § 1988. Marek v. Chesny, slip op. at 8-9. In any case, to the extent any "ethical dilemma" may be occasioned by simultaneous negotiation,[14/] it springs

---

14/ One may question whether any true "ethical dilemma" is posed by simultaneous negotiation or offers of settlement conditioned on waived or reduced fees. Counsel in such a situation does not potentially violate one ethical precept in order to comply with another. Here, only one ethical obligation of plain-

(footnote continued)

directly from the operation of the fee-shifting statute and is not beyond the capacity of ethical counsel to resolve. White v. New Hampshire Dept. of Employment Security, 455 U.S. at 454 n. 15.

(footnote continued)

tiffs' counsel is implicated: the duty to serve the client's interests competently and zealously. Model Code of Professional Responsibility Canon 6, 7.

Instead, the discomfort experienced by plaintiffs' counsel in this case stems actually from the temptation to act inconsistently with the client's interests because of instruction from counsel's law firm employer not to waive fees. 743 F.2d at 650. The law firm, apparently viewing the prospect of a fee award as its entitlement, was at least as responsible for creating any conflict as was defendant's offer. As discussed below at pp. 45-50, these problems are easily avoided by early discussions and agreements with the client as well as the exercise of independent legal judgment on behalf of the client at all times. See Model Code DR 5-101(A); Model Rule 1.7(b).

C. The Effect Of The Ninth Circuit's Rule Is To Deter Settlement Of Civil Rights Cases, Contrary To Congressional Policy, The Interests of Plaintiffs, And Sound Judicial Administration.

If the rule devised by the court below is adopted, a defendant in a civil rights lawsuit who is inclined to settle will not be able to ascertain his total liability. Such a defendant will thus be far less disposed to compromise the case, because it would leave a significant aspect of liability unresolved.

No extended defense of this proposition is necessary. This and other courts have recognized that unless a defendant is able to ascertain his total liability from a proposed settlement, he will understandably be reluctant to agree to it. E.g., Marek v. Chesny, slip op. at

4; Moore v. National Ass'n of Securities Dealers, 762 F.2d at 1104-05 and n. 14. Partly for this reason, the Court in White v. New Hampshire Dept. of Employment Security declined to adopt a rule identical to that adopted by the court below in this case. 455 U.S. at 453-454 n. 15.[15/]

15/ Perhaps more tellingly, it is reported that notwithstanding the mandatory bifurcated negotiation rule in Prandini v. National Tea Co., 557 F.2d 1015 (3d Cir. 1977), some trial judges in the Third Circuit encourage the parties engaged in settlement talks to discuss data sufficient to allow the defendant to make an educated guess as to fees liablity. The trial judges believe that defendants are not likely to settle cases unless they know the full extent of their liability. Comment, Settlement Offers Conditioned Upon Waiver of Attorneys' Fees: Policy, Legal, and Ethical Considerations, 131 U. Pa. L. Rev. 793, 804 n. 90 (1983). Whether those educated guesses are ultimately accurate enough to satisfy defendants is not disclosed.

The rule may also deter settlements by deflating the value of whatever merits offers defendants do make, in order to provide a cushion against a subsequent fee award of unknown amount.[16/] Since the merits offer may be lower than it might otherwise be, relative to the strength of the plaintiff's case (par-

---

16/ As noted by one commentator,

> Negotiation of the merits will proceed on an implicit understanding of what a reasonable fee claim would be, and that understanding will inevitably influence the negotiation. Defendants may provide a cushion for subsequent fee claims when negotiating the merits of a settlement, and plaintiffs' attorneys, cognizant of the defendants' strategy, may not vigorously protest the strategy because the amount of the fee is at stake.

Calhoun, Attorney-Client Conflicts of Interest and the Concept of Non-negotiable Fee Awards Under 42 U.S.C. §1988, 55 U. Colo. L. Rev. 341, 363 (1984).

ticularly if defendant's offer is premised on an overestimation of his fee liability), it is less likely to be accepted in compromise of the merits claim, again forcing the case to trial. Furthermore, to the extent such deflated offers are accepted, it is the civil rights plaintiff who suffers the consequence of the rule.

In sum, adoption of the rule established by the court below can only widen the gulf between the parties as they consider the possibility of compromising a civil rights lawsuit, with the inevitable result that fewer cases will be settled, more cases will be fully litigated, and fewer plaintiffs will receive any substantive relief. Marek v. Chesny, slip op. at 8 (some plaintiffs will re-

ceive relief through settlement where they might have recovered nothing by going to trial).

In addition to deterrence of merits settlements, another effect of the bifurcated negotiation rule is to preserve controversies over fees even if the parties do settle the merits claims. In Hensley v. Eckerhart, 461 U.S. 424 (1983), this Court warned that "a request for attorney's fees should not result in a second major litigation," and further stated that "[i]deally, . . . litigants will settle the amount of a fee." Id. at 437. However, as indicated by the ever-increasing amount of litigation under § 1988 and similar fee-shifting provisions, the ideal is difficult to achieve. Because of the large number of

"wild cards" that enter into the calculation of a "reasonable" attorney's fee, as well as frequent disagreements over the degree to which a plaintiff has "prevailed" and the availability of bonuses, "[a]ttorney's fees . . . are a different breed of cat," largely immune from reliable estimates, even by knowledgeable defense counsel. Delta Air Lines, Inc. v. August, 450 U.S. 346, 379 n. 5 (1981) (Rehnquist, J., dissenting). See also supra note 1. The uncertainty governing fees calculation generates a wide disparity between what plaintiffs' and defendants' counsel believe is "reasonable" under § 1988. The net result is that settlement is stymied, the fees claim is forced to trial, and the federal courts are treated to "one of the least

socially productive types of litigation imaginable."[17/] A rule that not only discourages but prohibits settlement of fee claims with the merits can only ensure the continued generation of such useless litigation.

As § 1988 was intended to vindicate the rights of civil rights plaintiffs not only through litigation but also through settlement,[18/] these anti-settlement effects of the rule adopted below conflict with the intent of Congress. By contrast, as this Court pointed out in Marek v. Chesny, slip op.

17/ Hensley v. Eckerhart, 461 U.S. at 442 (Brennan, Marshall, Blackmun, and Stevens, JJ., concurring in part and dissenting in part).

18/ See S. Rep. No. 1011, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5912; H.R. Rep. No. 1558, 94th Cong., 2d Sess. 7 (1976).

at 8-9, there is nothing inconsistent with the purpose of the statute in offering to settle simultaneously both the substantive and fee claims. Indeed, to the extent that the parties can successfully employ practices designed to induce and facilitate settlement, they serve not only their own interests but also those of the public. Delta Airlines, Inc. v. August, 450 U.S. at 363 (Powell, J., concurring).

II. LAWYERS' ETHICAL OBLIGATIONS DO NOT PRECLUDE THE SIMULTANEOUS NEGOTIATION AND SETTLEMENT OF ATTORNEY'S FEES WITH THE MERITS OF A CLASS ACTION.

The limitations imposed by the Court of Appeals on the negotiation and settlement of civil rights class actions rest exclusively on "the possibility of diverging interests of the [plaintiffs']

lawyer and the class." 743 F.2d at 652. The mere potential for a conflict of interest, however, does not warrant a blanket federal rule prohibiting the settlement, including waiver, of attorney's fees with the merits of the case for several reasons. First, standards governing professional ethics do not preclude attorneys from negotiating or waiving attorney's fees. Second, a rule prohibiting such settlements may interfere with defense counsel's obligation to adequately represent his client. Finally, adequate mechanisms exist to meet any conflict of interest that may arise during the settlement of attorney's fees with the merits of a federal class action.

A. Standards Governing Professional Ethics Do Not Prohibit The Simultaneous Negotiation Or Waiver Of Attorney's Fees.

One of a lawyer's foremost obligations is to exercise independent judgment in behalf of a client. Model Rules of Professional Conduct Rule 2.1. See also Model Code of Professional Responsibility Canon 5.[19/] In order to exercise that independent judgment a lawyer must not allow his own interest to adversely af-

---

19/ Beginning with the Canons of Professional Ethics adopted in 1908, the American Bar Association has continually published standards for professional conduct. In 1970, the often-amended Canons of Professional Ethics were replaced by the Model Code of Professional Responsibility (Model Code). The Model Code consists of three separate but interrelated parts: Canons, Ethical Considerations (EC), and Disciplinary Rules (DR). The American Bar Association's most recent compilation of ethical guidelines is contained in the Model Rules of Professional Conduct adopted in 1983 (Model Rules).

fect his client's interest. Model Rule 1.7; Model Code EC 5-1.

The possibility of diverging interests between counsel for a class and the members of the class does not exist only in those cases where a statutory fee is available. For example, a class action that is settled by the establishment of a common fund out of which an attorney's fee will be paid, positions the interests of the attorney much more directly against those of the class members. Similarly, an attorney who has agreed to represent a class seeking damages on a contingent fee basis may be faced with a potential conflict during the negotiation of a settlement, since contingent fees, like statutory awards, give an attorney

a pecuniary interest in the outcome of the litigation. In short, the potential for a conflict of interest exists in a variety of fee arrangements. But, as long as plaintiffs' counsel exercises independent judgment during the negotiations and does not allow his interest in fees to adversely affect his clients' interest, ethical problems will be avoided.

In White v. New Hampshire Department of Employment Security, supra, the petitioners urged the Court to adopt a rule similar to that fashioned by the Court of Appeals in this case. The Court recognized the ethical issues involved in prejudgment fee negotiations; nevertheless, no limitations were imposed upon the usual negotiation process. 455 U.S.

at 453-454 n.15. More recently, in Marek v. Chesny, supra, the Court rejected the suggestion that settlements in civil rights cases should be treated differently from those in other cases and held that fees are properly included in a Rule 68 offer for judgment in a civil rights action. There is no logical distinction between including the fee issue in settlement discussions in order to induce settlement and including fees in a Rule 68 offer, the purpose of which is, of course, to induce settlement.

Neither the Model Rules nor the Model Code prohibit settlements that include a fee provision or attempt in any way to alter the manner by which cases are ordinarily settled. The drafters of the Model Rules were aware of the contro-

versy over the simultaneous negotiation of fees and merits or settlements conditioned upon the waiver of fees, but nonetheless chose not to include a provision prohibiting such conduct or settlement offers.[20/]

20/ In the "Legal Background" discussion associated with Model Rule 1.5 (Fees), the drafters of the Model Rules acknowledge the New York City Bar Association Opinion 80-94, 36 Rec. A.B. City N.Y. 507 (1981), that prohibits simultaneous settlement of fees and merits in civil rights cases because to do so would violate DR 1-102(A)(5) ("A lawyer shall not engage in conduct that is prejudicial to the administration of justice.")

However, the drafters specify expressly in discussing the scope of the Model Rules that only "the text of each rule is authoritative. . . . The [Legal Background] notes have not been adopted, do not constitute part of the Model Rules and are not intended to affect the application or interpretation of the Rules and Comments." Annotated Model Rules of Professional Conduct (1984) p. 11.

Of course, whether the appropriate governmental entity in any given juris-

(footnote continued)

Moreover, the Model Rules and Model Code recognize that situations arise in which a lawyer's interest may diverge from his client's interest. Yet, lawyers are given considerable leeway to accommodate such divergent interests. Model Rule 1.7(b) provides:

> A lawyer shall not represent a client if the representation of that client may be materially limited by . . . the lawyer's own interests, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation . . . .

(footnote continued)

diction chooses to adopt a rule barring simultaneous negotiation is a matter that remains within its prerogatives. However, if this Court affirms the decision below, a federal rule of law will have been created, arguably preempting state regulation of bar conduct, at least in cases of the type now before the Court.

See also Model Code DR 5-101(A).[21/] As the White Court recognized, and DR 5-105(A) explicitly provides, ethical counsel can and should find an ethical resolution to potential conflicts with the client.

The ethical concerns raised by the Court of Appeals will be avoided if the usual dynamics of negotiation, coupled with counsel's primary obligation to his client, govern the professional conduct of counsel during the settlement of civil rights cases. In considering a settlement offer that includes either a waiver of fees or an amount less than counsel would otherwise be requesting from the court, plaintiffs' attorney should ex-

---

21/ Similarly, contingent fee arrangements are recognized even though such a fee arrangement may create a conflict of interest. Model Rule 1.5(c); Model Code DR 5-103(A)(2).

amine with his clients the strengths and weaknesses of the case just as he would if fees were not in issue. As in the settlement of any issue, plaintiffs may direct their counsel to waive claims upon which they are unlikely to prevail. In a case that is weak on the merits, for example, an attractive offer by the defendant on the merits along with a reduced or waived fee will serve both the clients' and attorneys' interest well. Moore v. National Association of Securities Dealers, 762 F.2d at 1098-99. In any event, where plaintiffs' likelihood of success is strong, plaintiffs' counsel is not ethically bound to accept such an offer but instead is free to reject it and proceed to trial. Id. at 1113 (Wald, J., concurring). As a practical matter,

defense counsel is unlikely to request that plaintiffs waive fees or accept an unreasonably low fee if plaintiffs have a strong case on the merits; defendants are well aware of their potential fee liability should they lose after a lengthy trial on the merits.

B. If Attorneys For Plaintiffs Discuss And Set Out In Writing Their Fee Agreement As They Should, There Will Be No Ethical Problems When Subsequent Settlement Offers Are Made.

The court below discerned a potential ethical dilemma created, in its view, by defendant's settlement conduct; it thus created a prophylactic rule that is directed solely at that conduct. However, if one shifts the analytical focus from the defendant at the time of settlement

to the plaintiffs and their attorney at the time their relationship is established, one finds a far more neutral device to minimize, if not eliminate, the potential ethical difficulties arising from settlement negotiations.

When a civil rights class action is initiated, counsel and the plaintiff representatives[22/] are in no different situation than the parties to an ordinary contingent fee contract.[23/] Plaintiffs who are unable to finance the litigation

---

22/ In cases involving minors or legal incompetents, counsel should ordinarily be retained by parents, guardians, or guardians ad litem.

23/ Of course, contingent fee arrangements have long been recognized as an appropriate means of securing legal representation in certain kinds of cases. Model Rule 1.5(c); Model Code DR 2-106(C), EC 2-20.

agree that their attorney may be compensated by a fixed amount or percentage of the recovery in the event the plaintiffs succeed. The fact that there may be a statutory provision allowing for attorney's fees does not affect the fundamental nature of this relationship. See, e.g., Chesny v. Marek, 720 F.2d 474, 478 (7th Cir. 1983), rev'd on other grounds, sub nom. Marek v. Chesny, supra.

Of course, it is rightfully incumbent upon counsel to clarify the fee arrangement as early as possible when legal representation is initiated. The Model Rules strongly encourage counsel to reduce to writing the fee agreement as soon as possible, particularly when it is a contingent fee arrangement:

> (b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.
>
> (c) . . . A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. . . .

Model Rule 1.5(b)-(c).[24/]

Thus, counsel for plaintiffs in civil rights actions should set out in writing

---

24/ See also Model Code EC 2-19 (encouraging fully explained and clear fee agreements with clients, particularly clients with little or no experience with legal fees; contingent fee arrangements especially should be in writing).

the understanding they reach with their clients regarding attorney's fees. Such a retainer agreement could directly address the diversity of interests that may arise when the plaintiff is presented with a settlement offer addressing both the merits of the case and attorney's fees. The fee agreement could specify the circumstances, if any, in which a settlement offer which demands reduction or a waiver of attorney's fees would be accepted.25/ Such a retainer agreement would eliminate many, if not all, of the

---

25/ In suits for damages, the retainer agreement could also set the fee as a certain percentage of any amount awarded or achieved through settlement with any attorney's fees added into the lump sum, or with any attorney's fees to go to the plaintiffs' attorneys on top of the attorney's fixed share of recovery on the merits.

ethical concerns that face plaintiffs' attorneys when they are presented with settlement offers addressed to both the merits and attorney's fees. See Moore, 762 F.2d at 1112 n. 1 (Wald, J., concurring).

Thus, with no additional burden on the parties or the judicial system, many of the purported ethical problems would be eliminated with the proper utilization of retainer agreements. Instead of pursuing these avenues open to ethical counsel, some attorneys with whom the amici have contact have sought to import an absolute bar to simultaneous negotiation. Such an across-the-board rule, premised merely upon a "possible" conflict, cannot be justified and should be rejected by this Court.

C. A Rule Prohibiting Simultaneous Negotiation Impedes Defense Counsel's Obligation To His Client.

The rule created by the court below, by seeking to insulate plaintiffs' counsel from the possibility of conflicts, seriously impairs defense counsel's ability to provide competent and, therefore, ethical representation to his client.[26/] One of the chief concerns of the parties in any action is whether to settle the case and thereby avoid the time, expense, and uncertainty of a trial. This concern is of particular importance in a civil rights class

---

26/ Model Rule 1.1 provides: "A lawyer shall provide competent representation to a client." Similarly, Canon 6 of the Model Code states: "A lawyer should represent a client competently." Canon 7 further states: "A lawyer should represent a client zealously within the bounds of the law."

action because of the time-consuming and costly nature of such trials. The ultimate decision to settle a case rests, of course, with the client. Model Rule 1.2(a); Model Code EC 7-7. A defendant cannot make an informed decision on whether to settle, however, unless his attorney provides him with all the relevant facts necessary for such a decision. Model Code EC 7-8. An essential fact, if not the essential fact, in deciding whether to settle is the defendant's total potential liability, financial and otherwise.

The Court has recognized the defendant's need to know his total exposure to liability upon settlement. White v. New Hampshire, 455 U.S. at 454; Marek v. Chesny, slip op. at 4. If defense counsel is barred from negotiating a fee set-

tlement, he is in no position to advise his client completely as to the relative risks and benefits of settlement and trial. Requiring defense counsel to leave a key element of a civil rights case unsettled and unnegotiated will expose his client to unforeseen monetary liability. ". . . [D]efense counsel does his client a disservice if he settles a case as to one or more [items of relief], but leaves open the possibility of further recovery or action on any of the remaining ones." Lazar v. Pierce, 757 F.2d at 439 (Torruella, J., concurring). A rule that encourages incompetent lawyering by defense counsel, implicating his ethical duties to the defendant, simply has no place in our legal system and should be rejected by the Court.

III. ADEQUATE MECHANISMS EXIST TO ENSURE THAT A SETTLEMENT CONTAINING A FEE PROVISION HAS BEEN PROPERLY NEGOTIATED AND IS FAIR AND REASONABLE.

In the event that the interests of the class members and their counsel ripen into an actual conflict during the settlement of a class action, adequate mechanisms are in place to meet the problem. The most important protection for the parties is the required court approval for the settlement of a class action. Rule 23(e) of the Federal Rules of Civil Procedure provides:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

The purpose of this rule is to ensure that the interests of all the class

members, not just the named plaintiffs,[27] are adequately represented in the settlement. Burks v. Lasker, 441 U.S. 471, 485-486 n. 16 (1979).[28]

In order to obtain court approval for a settlement under Rule 23(e), the parties are generally required to demonstrate that the settlement is fair, reasonable, and adequate. Malchman v. Davis, 761 F.2d 893, 895 (2d Cir. 1985); Officers for Justice v. Civil Service

---

27/ The rule was designed to ensure an adequate settlement for the class, not an adequate fee for the class attorney.

28/ The potential for a conflict of interest between the class representatives and the remaining class members has been widely recognized. See, e.g., Officers for Justice v. Civil Service Commission, 688 F.2d 615, 624 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983); see C. Wright & A. Miller, Federal Practice and Procedure, § 1797, p. 230 (1972).

Commission, 688 F.2d at 625 and cases cited. In determining whether a settlement is fair, reasonable, and adequate, district courts have compared the substantive terms of the settlement with the strengths of plaintiffs' case. E.g., Weinberger v. Kendrick, 698 F.2d 61, 73 (2d Cir. 1982), cert. denied, 104 S. Ct. 77 (1983). Courts have also examined the negotiation process to ensure that the settlement is the result of good-faith, arms-length bargaining and free from coercion or collusion. Id.

Thus, the established standards for court approval of a class action settlement provide adequate safeguards. The district court is able to ensure, for example, that a settlement containing a negotiated or waived fee is the product of good-faith bargaining and is a rea-

sonable compromise of the parties' claims. If the district court determines that the fee provision is too generous as compared with the class relief, or if a negotiated amount or waiver is unreasonable in light of the facts and circumstances of the case, it has the authority to reject the settlement package and send the parties back to the bargaining table or schedule the case for trial.[29/] The district court also has

---

29/ E.g., Franks v. Kroger Co., 649 F.2d 1216 (6th Cir. 1981); Soskel v. Texaco, Inc., 94 F.R.D. 201 (S.D. N.Y. 1982). In cases where the fee is to be paid out of a common fund, the district court can reduce the fee to ensure that the class members have received a fair and reasonable settlement. See, e.g., Tornabene v. General Development Corp., 88 F.R.D. 53, 62 (E.D. N.Y. 1980). It would not be appropriate, however, for the district court to accept the settlement on the merits but increase the defendant's fee liability. To do so would undermine the settlement process since the fee and merits components of the settlement have been negotiated together and are "part and parcel of each other." Moore, 762 F.2d at 1110 n. 21.

the authority under Rule 23(e) to notify the class members of the proposed settlement and consider whatever objections they may have.

A potential conflict of interest, or even an actual conflict, is not unusual in the class action context.[30/] Rule 23(e) was designed, and is sufficient, to address that issue on a case-by-case basis. In sum, adoption of the Ninth Circuit rule is inconsistent with

---

30/ This case, of course, is a class action and the amici have discussed the issues in that context. The amici note, however, that in non-class litigation the plaintiff is not more vulnerable because of the non-availability of Rule 23(e) review. To the contrary, in a non-class action the client can discuss a joint fees-merits settlement offer with his attorney and decide whether it represents an acceptable result. He controls the settlement decision himself. E.g., Moore v. National Ass'n of Securities Dealers, 762 F.2d at 1105 n. 18.

established ethical standards, is unnecessary in light of existing safeguards, and creates more problems than it solves.

CONCLUSION

The *amici* States ask the Court to reverse the decision of the Court of Appeals for the Ninth Circuit. Further, for the reasons stated above, the *amici* urge the Court not to adopt any *per se* rules which may prevent the normal processes and dynamics of negotiation to operate in civil rights cases, consistent with existing ethical and legal constraints.

Respectfully submitted,

FRANCIS X. BELLOTTI
ATTORNEY GENERAL
COMMONWEALTH OF MASSACHUSETTS

ELLEN JANOS*
CARL VALVO
Assistant Attorneys General
One Ashburton Place, Rm. 2019
Boston, MA 02108
(617) 727-1020

*/ Attorney of Record

CHARLES A. GRADDICK, Attorney General
State of Alabama

HAROLD BROWN, Attorney General
State of Alaska

ROBERT K. CORBIN, Attorney General
ANTHONY CHING, Solicitor General
State of Arizona

JOHN STEVEN CLARK, Attorney General
State of Arkansas

JOHN VAN de KAMP, Attorney General
State of California

DUANE WOODARD, Attorney General
State of Colorado

CHARLES M. OBERLY, Attorney General
State of Delaware

JIM SMITH, Attorney General
State of Florida

MICHAEL J. BOWERS, Attorney General
State of Georgia

RICHARD G. OPPER, Attorney General
Territory of Guam

CORINNE WATANABE, Acting Attorney General
State of Hawaii

LINLEY E. PEARSON, Attorney General
State of Indiana

THOMAS J. MILLER, Attorney General
State of Iowa

ROBERT T. STEPHAN, Attorney General
State of Kansas

DAVID L. ARMSTRONG, Attorney General
State of Kentucky

WILLIAM J. GUSTE, JR., Attorney General
State of Louisiana

JAMES E. TIERNEY, Attorney General
State of Maine

STEPHEN H. SACHS, Attorney General
State of Maryland

FRANK J. KELLEY, Attorney General
State of Michigan

HUBERT H. HUMPHREY, III, Attorney General
State of Minnesota

EDWIN LLOYD PITTMAN, Attorney General
State of Mississippi

WILLIAM L. WEBSTER, Attorney General
State of Missouri

MIKE GREELY, Attorney General
State of Montana

BRIAN McKAY, Attorney General
State of Nevada

STEPHEN E. MERRILL, Attorney General
State of New Hampshire

IRWIN I. KIMMELMAN, Attorney General
State of New Jersey

LACY H. THORNBURG, Attorney General
State of North Carolina

NICHOLAS SPAETH, Attorney General
State of North Dakota

ANTHONY J. CELEBREZZE, JR., Attorney General
State of Ohio

MICHAEL TURPEN, Attorney General
State of Oklahoma

DAVID FROHNMAYER, Attorney General
State of Oregon

LeROY S. ZIMMERMAN, Attorney General
Commonwealth of Pennsylvania

HECTOR RIVERA-CRUZ, Attorney General
Commonwealth of Puerto Rico

ARLENE VIOLET, Attorney General
State of Rhode Island

TRAVIS MEDLOCK, Attorney General
State of South Carolina

MARK V. MEIERHENRY, Attorney General
State of South Dakota

W.J. MICHAEL CODY, Attorney General
State of Tennessee

JIM MATTOX, Attorney General
State of Texas

DAVID L. WILKINSON, Attorney General
State of Utah

JEFFREY AMESTOY, Attorney General
State of Vermont

WILLIAM J. BROADDUS, Attorney General
Commonwealth of Virginia

VICTOR G. SCHNEIDER, Acting Attorney General
Virgin Islands of the United States

KENNETH O. EIKENBERRY, Attorney General
State of Washington

CHARLIE BROWN, Attorney General
State of West Virginia

BRONSON C. La FOLLETTE, Attorney General
State of Wisconsin

A.G. McCLINTOCK, Attorney General
State of Wyoming

WILLIAM J. GUSTE, JR., Attorney General
State of Louisiana

JAMES E. TIERNEY, Attorney General
State of Maine

STEPHEN H. SACHS, Attorney General
State of Maryland

FRANK J. KELLEY, Attorney General
State of Michigan

HUBERT H. HUMPHREY, III, Attorney General
State of Minnesota

EDWIN LLOYD PITTMAN, Attorney General
State of Mississippi

WILLIAM L. WEBSTER, Attorney General
State of Missouri

MIKE GREELY, Attorney General
State of Montana

BRIAN McKAY, Attorney General
State of Nevada

STEPHEN E. MERRILL, Attorney General
State of New Hampshire

IRWIN I. KIMMELMAN, Attorney General
State of New Jersey

LACY H. THORNBURG, Attorney General
State of North Carolina

NICHOLAS SPAETH, Attorney General
State of North Dakota

ANTHONY J. CELEBREZZE, JR., Attorney General
State of Ohio

MICHAEL TURPEN, Attorney General
State of Oklahoma

(See backside cover for
additional counsel)

DAVID FROHNMAYER, Attorney General
State of Oregon

LeROY S. ZIMMERMAN, Attorney General
Commonwealth of Pennsylvania

HECTOR RIVERA-CRUZ, Attorney General
Commonwealth of Puerto Rico

ARLENE VIOLET, Attorney General
State of Rhode Island

TRAVIS MEDLOCK, Attorney General
State of South Carolina

MARK V. MEIERHENRY, Attorney General
State of South Dakota

W.J. MICHAEL CODY, Attorney General
State of Tennessee

JIM MATTOX, Attorney General
State of Texas

DAVID L. WILKINSON, Attorney General
State of Utah

JEFFREY AMESTOY, Attorney General
State of Vermont

WILLIAM J. BROADDUS, Attorney General
Commonwealth of Virginia

VICTOR G. SCHNEIDER, Acting Attorney General
Virgin Islands of the United States

KENNETH O. EIKENBERRY, Attorney General
State of Washington

CHARLIE BROWN, Attorney General
State of West Virginia

BRONSON C. La FOLLETTE, Attorney General
State of Wisconsin

A.G. McCLINTOCK, Attorney General
State of Wyoming

BEST AVAILABLE COPY